

No. 78-722

Supreme Court, U.S.
FILED
DEC 19 1978
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

DAVID ALLEN STARR, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-722

DAVID ALLEN STARR, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

Following a jury trial in the United States District Court for the District of Iowa, petitioner was convicted of conspiracy to distribute methylenedioxymethamphetamine sulfate (MDA), in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B).¹ He was sentenced to six months' imprisonment and two years' special parole. The court of appeals rejected petitioner's claim that the indictment was defective, but it reversed his conviction and remanded the case for a new trial after concluding that petitioner's severance motion should have been granted (Pet. App. A1-A10).

¹Petitioner was convicted on Count 1 of a two-count indictment; he was acquitted of a charge of conspiracy to use communications facilities to facilitate narcotics offenses, in violation of 21 U.S.C. 843(b). Co-defendant Lindenmayer was convicted on both counts. Count 2 was dismissed as to co-defendants Broders and Conwell prior to trial. Broders was convicted on Count 1; Conwell was acquitted on that count.

Count 1 of the indictment (Pet. App. A2) charged that petitioner and his co-defendants "willfully and knowingly did combine, conspire and agree * * * to distribute methylenedioxymethamphetamine sulfate (MDA), a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and Section 841(b)(1)(B)." Although the indictment charges that petitioner "willfully and knowingly" conspired, petitioner contends that it was defective in failing to charge that the underlying offense, *i.e.*, distribution of MDA, was to be carried out "knowingly or intentionally," as Section 841(a) provides.

While there does appear to be a conflict among the circuits on whether a conspiracy indictment must allege that the defendant's conspiracy extended to every element of the underlying substantive offense (see *Nelson v. United States*, 406 F. 2d 1136 (10th Cir. 1969)), review is not warranted in this case. In the first place, the court of appeals remanded the case for a new trial and thus its ruling on the indictment is not ripe for review. See *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

Second, this Court has denied certiorari in previous cases calling attention to this conflict. See, *e.g.*, *Inciso v. United States*, 429 U.S. 1099 (1977).

Finally, the United States Attorney advises us that, when the grand jury returns on January 23, 1979, she will seek a superseding indictment against petitioner charging that the object of the conspiracy was the knowing or intentional distribution of MDA. If such an indictment is obtained, petitioner will no longer be subject to the present indictment, and his claim will therefore be moot. We will advise the Court regarding the return of any superseding indictment (assuming that one is returned) in the event that the Court has not acted on the petition by that time.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

DECEMBER 1978